STATE OF MICHIGAN

COURT OF APPEALS

WOLVERINE WORLD WIDE, INC,

Plaintiff-Appellant,

v

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant,

and

ONEBEACON INSURANCE COMPANY f/k/a CGU INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 8, 2007

No. 260330
Kent Circuit Court
LC No. 01-011763-CK

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

This case involves two umbrella policies issued to plaintiff by defendant covering the years 1966 to 1972. A dispute arose as to whether the policies covered damages caused by contamination and pollution. Plaintiff, a manufacturer of footwear, produced a toxic sludge from its tannery operations. Plaintiff disposed of this sludge at the Butterworth Landfill site between the years 1965 and 1973 and at the Northeast Gravel site beginning in 1970 and ending in 1979. This contract dispute arises from alleged contamination and pollution related to waste disposal at these sites.

On April 9, 1991, the Michigan Department of Natural Resources (DNR) informed plaintiff that it may be potentially liable for contamination at the Northeast Gravel site. Although plaintiff denied liability, it cooperated with an investigation of the site, entered into negotiations with the DNR, and entered into an agreement with other potentially responsible parties to pay for the cost of a site investigation. The investigation confirmed that plaintiff's tannery sludge was not responsible for the contamination at the site. Nonetheless, Northeast Gravel sued plaintiff for the cost to clean up the pollution and contamination. It cost plaintiff $199,339.20 to resolve the matter related to that site. On February 27, 1997, the Environmental

Protection Agency (EPA) notified plaintiff that it may be potentially liable for contamination at the Butterworth site. Plaintiff subsequently partook in an allocation mediation process with other potentially responsible parties (PRPs). The mediator ultimately determined that plaintiff was liable for 1.306% of the fault. Plaintiff did not agree with this result, but after conducting a cost benefit analysis, it decided to submit to the mediator's findings and to pay in accordance with his findings. As of April 1, 2004, plaintiff incurred $1,224,550.84 in remediation costs.

Plaintiff filed the instant suit on November 20, 2001, seeking to recover the defense and settlement costs incurred in relation to both landfill sites. The trial court ultimately granted summary disposition to defendant, finding that there were no genuine issues of material fact and that defendant only owed a portion of the costs plaintiff incurred. The trial court relied on the time-on-the-risk theory to allocate damages.

On appeal, the plaintiff first asserts that the trial court erred when granting summary disposition to defendant because there was sufficient evidence to establish that defendant was required to provide coverage for "all sums" plaintiff incurred for occurrences within the policy period. We review de novo the trial court's grant of summary disposition. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Additionally, the interpretation of clear contractual language is an issue of law, which is reviewed de novo on appeal. *Id*.

An insurance policy is like any other contract; it is an agreement between the parties. *Heath v State Farm Mutual Automobile Ins Co*, 255 Mich App 217, 218; 659 NW2d 698 (2002). The primary goal in the interpretation of a contract is to honor the intent of the parties, and when presented with a dispute, a court must determine the parties' agreement and enforce it. *Klapp, supra* at 473. When an ambiguity in an insurance contract cannot otherwise be resolved, it should be strictly construed against the drafter. *Id*. at 471-474; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003). Determination of the scope of coverage is a separate inquiry from whether the coverage is negated by an exclusion. *Heniser v Frankenmuth Mutual Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). Still, this Court should read the insurance contract as a whole to effectuate the intent of the parties, and clear and specific exclusions must be enforced. *Id*. at 332-333; *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004).

Plaintiff asserts that the claims stemming from the Northeast Gravel and Butterworth site should trigger the property damage liability provisions of defendant's policies Plaintiff argues that defendant failed to follow the express terms of the policies and that the trial court erred in adopting the time-on-the-risk method of allocation. Plaintiff argues that the time-on-the-risk method of allocation is not reconcilable with the terms of these umbrella policies. We disagree. In *Arco Industries Corp v American Motorists Ins Co*, 232 Mich App 146; 594 NW2d 61 (1998), this Court addressed nearly identical policy language, for a very similar type of damage. It concluded that:

> Thus, it appears that the intent of the drafters of the policies at issue here, whose language we are required to uphold, was to provide coverage for the policy period only, and not for damages arising before or after the policy period. Again, this intent precludes imposition of an "all sums" or joint and several liability approach. "While the insurers agreed to indemnify [the insured] for 'all sums,' it

had to be for sums incurred during the policy period." [*Id*. at 164 (citation omitted).]

The policies in question limit coverage to "all sums" for which the insured becomes obligated because of property damage as "included in the definition of 'ultimate net loss.'" The term "ultimate net loss" means "the total sum which the insured, or the company as his insurer, or both, becomes legally obligated to pay as damages, because of property damage . . . which are paid as a consequence of any occurrence covered hereunder." The term "occurrence" is specifically defined as "an event, or continuous or repeated exposure to conditions, which results during the policy period in personal injury, property damage, or advertising liability . . . ." The "total sums" and "ultimate net loss" language of the policy, when read in conjunction with the definition of occurrence, makes clear that coverage is available under the policies, subject to other terms and conditions, for property damage *which results during the policy period*, but is not available for property damage which takes place outside of the policy period.

Plaintiff additionally argues that no other insurer is liable for the pollution because the actual disposal of the waste occurred under the period of defendant's policies. Plaintiff suggests that when the physical disposal ceased, the property damage also ceased for insurance policy purposes. Thus, damages cannot be prorated for defendant. This position is without merit. Insurers on the risk when "incremental environmental degradation" continues may be liable on a pro-rata basis. *Gelman Sciences, Inc v Fidelity & Cas Co of NY*, 456 Mich 305, 324-326, 329; 572 NW2d 617 (1998), overruled in part on other grounds *Wilkie, supra*. Where, as here, there was ongoing environmental damage over many years while the subject policies were in force and thereafter, using a time-on-the-risk method for allocating damages is appropriate. *Arco, supra.* Therefore, the trial court properly ruled that the time-on-the-risk method of allocation was the correct method to employ in determining the amount of damages for which defendant was liable.

Plaintiff next asserts that the trial court erred in applying the time-on-the-risk method of allocating damages. Plaintiff asserts that the proper period over which to allocate defendant's percentage of payment is not the time period from when the contaminants were disposed of to the time of clean up. Rather, it argues that the period of time when the actual disposal of the contaminants occurred is the only time period to be considered. Again, we disagree.

In order to understand the period of time over which damages should be allocated, it is necessary to understand when coverage is triggered. In *Gelman, supra* at 320, the Court found the policy language required an "injury-in-fact" trigger for coverage, meaning "the trigger . . . is actual property damage." *Id*. at 314. Under this approach, the question is "when exposure to the pollutants resulted in actual property damage in the facts of a given a case." *Id*. The Court explained:

> Some commentators have noted that the injury-in-fact approach often looks identical to the continuous trigger theory. 64 U Chi LR 257, 262. This is likely because the concept of "injury in fact" is flexible. The factfinder can determine that injury occurred at any number of points, from initial exposure through manifestation. Further, in continuous damages cases, injury may occur repeatedly through numerous consecutive policy periods. [*Gelman, supra* at 314 n 8.]

Damages can therefore be triggered at the time the pollutants were deposited until the time the contamination is removed or remedied. Those insurers who provide policies any time in between may be liable on a pro rata basis. *Id.* at 324-325, 329.

When applying the time-on-the-risk method of allocation at the Butterworth site, the trial court found undisputed that the damages extended over a period of 33 years. The damages began in 1965 and continued through 1998 when the site was remedied. Therefore, each annual period within that timeframe would be allocated 1/33 of the total loss. Plaintiff had incurred $1,177,886.41 in investigating, defending, and resolving its liability at the Butterworth site. Taking this number and dividing it by the 33 years in which damage incurred results in an average of $35,693 of damage per year.

Applying the time-on-the-risk method of allocation at the Northeast Gravel site yields a similar result. Plaintiff began dumping its sludge and contaminating the ground at the Northeast Gravel site in 1970. The damage occurred until at least 1991 when plaintiff agreed to cooperate in a remedial investigation of the portion of the site where plaintiff dumped its sludge. Therefore, the damages must be allocated over a time period of 22 years. Investigating, defending, and resolving its alleged liability at the Northeast Gravel site cost plaintiff $199,339.20. This averages to approximately $9,061 per year.

Defendant's policies only afford coverage in excess of the underlying primary insurance policy's annual limits of $50,000. Defendant's obligation under the umbrella policies at issue did not arise until plaintiff incurred at least $50,000 in liability each year. If plaintiff did not reach $50,000 in an annual period, coverage under the umbrella policies was not triggered. Here, apportioning the damages over all the years where damages continued to occur equals less than $50,000 in damage in any year. Therefore, there was never any coverage under the umbrella policies, so summary disposition was therefore appropriate for defendant.

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey